Mulpha Pacific Sdn Bhd v Paramount Corp Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B02–350 OF 1998

MOKHTAR SIDIN, MOHD NOOR AHMAD AND MOHD GHAZALI JJCA

3 SEPTEMBER 2003

Contract — *Construction of terms of contract — Intention of parties — Plain meaning of the words — Whether intention of parties clear*

The respondent and appellant executed an agreement for the sale and purchase of shares of a company at the agreed price of RM90m. The appellant paid RM9m as a deposit. The completion date for the sale and purchase of the sale of shares was to be seven business days after the day the purchaser receives the FIC approval or within six months commencing the day after the date of this agreement, whichever is later ('the completion date'). Pursuant to cl 4.2 of the agreement, the parties agreed that if the appellant paid interest at 10%pa calculated on a daily basis on the outstanding balance sum, the appellant would be entitled to an additional month to pay the balance sum. By a letter dated 13 October 1997, the appellant informed the respondent that they would be taking the additional month. The balance sum became due for payment on 20 November 1997. However by notice dated 20 November 1997, the appellant informed that they in fact refuse to pay the balance sum due on 20 November 1997. In response, the respondent's solicitors informed the appellant that the respondent was terminating the agreement; forfeiting the deposit and demanding the payment of RM776,712.33 being the agreed interest accrued on the balance sum of 35 days from 17 October 1997 to 20 November 1997.

Held, dismissing the appeal with costs:

(1) It is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result (see p 363E–F).

(2) Based on the agreement between the appellant and respondent, in particular cl 4.2, the respondent would in fact be entitled to claim interest for the additional month with an additional three days even if the appellant had not breached the agreement and had completed the transaction (see p 363G–H).

[Bahasa Malaysia summary

Responden dan perayu telah memasuki satu perjanjian untuk jualbeli syer-syer sebuah syarikat pada harga yang dipersetujui RM90j. Perayu telah membayar RM9j sebagai deposit. Tarikh siap jualbeli jualan syer-syer tersebut adlah tujuh hari perniagaan selepas hari di mana pembeli menerima kelulusan FIC atau dalam tempoh enam bulan bermula sehari selepas tarikh perjanjian ini, yang mana terkemudian ('tarikh siap tersebut'). Menurut fasal 4.2 perjanjian, pihak-pihak bersetuju bahawa jika perayu membayar pada 10% setahun dikira pada kadar harian ke atas jumlah baki yang terhutang, perayu akan berhak mendapat satu bulan tambahan untuk membayar baki jumlah tersebut. Melalui sepucuk surat bertarikh 13 Oktober 1997, perayu telah memaklumkan responden bahawa mereka akan mengambil tambahan bulan tersebut. Baki jumlah tersebut perlu dibayar pada 20 November 1997. Namun begitu melalui notis bertarikh 20 November 1997, perayu telah memaklumkan bahawa mereka sebenarnya enggan untuk membayar baki jumlah yang perlu dibayar pada 20 November 1997. Sebagai jawapan, peguamcara-peguamcara responden telah memaklumkan perayu bahawa responden akan menamatkan perjanjian tersebut; merampas deposit tersebut dan menuntut bayaran RM776,712.33 sebagai faedah yang dipersetujui yang terakru ke atas baki jumlah tersebut untuk 35 hari dari 17 Oktober 1997 hingga 20 November 1997.

Diputuskan, dismissing the appeal with costs:

(1) Adalah kewajipan mahkamah untuk memberi kesan terhadap tawaran pihak-pihak bersesuaian dengan niat mereka dan apabila tawaran tersebut adalah secara bertulis niat tersebut dilihat daripada perkataan-perkataan yang digunakan kecuali jika perkataan-perkataan tersebut dianggap tidak menyampaikan niat tersebut dengan betul. Jika perkataan-perkataan tersebut adalah jelas, tidak banyak yang perlu dibuat oleh mahkamah. Mahkamah perlu memberi kesan terhadap maksud biasa perkataan-perkataan tersebut walaupun ia tidak menyukai akibatnya (lihat ms 363E–F).

(2) Berdasarkan perjanjian antara perayu dan responden, terutamanya fasal 4.2, responden pada hakikatnya berhak untuk menuntu faedah untuk bulan tambahan dengan tiga hari tambahan walapun perayu tidak melanggar perjanjian tersebut dan telah menyiapkan transaksi tersebut (lihat ms 363G–H).]

Notes

For cases on the intention of parties, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2762-2776.

Cases referred to

The Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd [1990] 1 CLJ 995 (refd)

Central Bank of India v Hartford Fire Insurance Co Ltd AIR [1965] SC 1288 (folld)

Appeal from: Originating Summons No MT3-24-792 of 1997 (High Court, Shah Alam)

Manjit Singh (*Mohan Krishnan* with him) (*A Zahari & Rakan-Rakan*) for the appellant.

I Jeganathan (*SK Yeoh & Jeganathan*) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court): This dispute arose from the termination of an agreement for the sale and purchase of shares of a company entered into between the appellant as purchaser and the respondent as vendor. On 22 May 1998, the learned judge gave judgment in favour of the respondent and ordered the appellant to pay RM776,712.33 together with interest from 21 November 1997 to date of payment to the respondent. The appellant appealed to this court. The following are the agreed facts:

(1) On 17 April 1997, the respondent (vendor) and the appellant (purchaser) executed an agreement for the sale and purchase of shares of a company named Wangsa Merdu Sdn Bhd ('the agreement') at the agreed price of RM90m.

(2) Pursuant to the agreement, the appellant paid RM9m, ie 10% of the purchase price as deposit leaving a balance of RM81 million to be paid ('the balance sum').

(3) Clause 4 of the agreement entitled 'Completion Date and Extended Completion Date' reads:

> 4.1 Subject to the provisions of this Agreement, the Completion Date for the sale and purchase of the Sale Shares shall be seven (7) business days after the day the Purchaser receives the FIC approval or within six (6) months commencing from the day after the date of this Agreement, whichever is later (herein referred to as 'the Completion Date').
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> 4.2 PROVIDED ALWAYS and it is hereby agreed between the parties hereto that the purchaser shall be entitled to an extension of one (1) month, commencing on the day immediately after the Completion Date (hereinafter referred to as 'the Extended Completion Date') subject to payment of the Agreed Interest calculated on a daily basis on the Balance Sum outstanding Provided that all accrued Agreed Interest shall be paid together with the Balance Sum.

Clause 1.1 of the agreement entitled 'Interpretation' provides the words 'Agreed Interest' shall mean 'interest at the rate of ten per centum (10%) per annum'. Pursuant to clause 4.2 of the agreement the parties agreed that if the appellant paid interest at 10%pa calculated on a daily basis on the outstanding balance sum, the appellant would be entitled to an additional month to pay the balance sum.

(4) By letter dated 13 October 1997, the appellant informed the respondent that they would be taking the additional month. Thus, the balance sum became due for payment on 17 November 1997.

(5) The appellant subsequently informed the respondent that they required an additional three days from 17 November 1997 to pay the balance sum. Thus, the balance sum became due for payment on 20 November 1997.

(6) By notice dated 20 November 1997, the appellant informed the respondent that they now refuse to pay the balance sum due on 20 November 1997.

(7) In response thereto, the respondent's solicitors informed the appellant, by letter dated 21 November 1997, that the respondent was:

(a) terminating the agreement;

(b) forfeiting the deposit; and

(c) demanding payment of RM776,712.3 being the agreed interest accrued on the balance sum for 35 days from 17 October 1997 to 20 November 1997 (inclusive) failing which interest shall continue to accrue on the sum of RM776,712.33.

(8) By letter dated 28 November 1997, the appellant's solicitors contended that pursuant to cl 13.1 of the agreement, the parties have specifically agreed that the remedy to the respondent is to forfeit the deposit; the appellant does not agree that interest in the amount as claimed is due to the respondent on termination of the agreement. Clause 13.1 of the agreement reads:

> Subject to the fulfillment of the Conditions Precedent, if the Purchaser shall fail neglect and/or refuse to pay the Final Balance and the Inter-Company Loan at the time set out in Clauses 4.1 or 4.2 hereof or in the manner set out in Clause 6 hereof, the Vendor shall be at liberty to terminate this Agreement by notice to the Purchaser whereupon the Deposit shall be forfeited to the Vendor absolutely and thereafter this agreement shall terminate and rendered null and void.

The appellant refused to pay the interest and hence, this suit. In his grounds of decision, the learned judge said the sole issue for determination by the court is whether the appellant is liable to the respondent in the sum of the accrued 'Agreed Interest' for the additional time granted to the appellant. The respondent contended that upon a proper and true construction of

cl 4.2 of the agreement, they are entitled to, and the appellant is liable to pay them, the aforesaid sum of RM776,712.33 as claimed. In opposing the claim, the appellant submitted:

(i) that the deposit of RM9m is also consideration for the 'additional time';

(ii) that they are excused from making payment of agreed interest for 'additional time' utilised by them because they had decided to deliberately default the agreement by refusing to pay the balance sum;

(iii) that the 'Agreed Interest' is to be considered in similar breath with the balance sum, which are not separate debts or obligations;

(iv) that if they fail or decide to breach or refuse to pay the balance sum, they are also not obliged to pay the 'Agreed Interest';

(v) that in the alternative, the charging of interest is a penalty and 'loss' and has to be proved before the respondent is entitled to the same;

(vi) that further in the alternative, in any event, based on cl 13.1 of the agreement, upon forfeiture of the deposit, the respondent is not entitled to any other remedy or to recover any other losses.

The learned judge was of the view:

(i) that the words 'subject to payment of the 'Agreed Interest' in cl 4.2 of the agreement, means that the payment of interest prevails so that additional time is only granted because the appellant had agreed at all times to pay interest of the additional time. He said:

> Therefore this part of Clause 4.2 provides that in consideration of the Plaintiff (respondent) agreeing to grant additional time to the Defendant (appellant), the Defendant agreed to pay daily sums calculated on the Agreed Interest rate to the Plaintiff for each day granted. Hence, the payment of interest prevails and is indeed a condition precedent to the granting of additional time by the Plaintiff to the Defendant. This obligation to pay interest is obviously in addition to the Defendant's obligation to pay the Balance Sum.;

(ii) that the words 'together with' appearing in the words 'all accrued Agreed Interest shall be paid together with the Balance Sum' means that the accrued 'Agreed Interest' is to be paid at the same time fixed by cl 4.2 of the agreement for the payment of the balance sum, which in this case was originally 17 October 1997, then extended by one month to 17 November 1997 and finally to 20 November 1997; he said:

> Clause 4.2 allows the Defendant (appellant) to buy additional time, without which the Defendant would already be in default and the Deposit would consequently be forfeited. If the Defendant wishes to have additional time to make payment of the Balance Sum, then the Defendant must provide additional consideration for the period of additional time that the Plaintiff (respondent) is put out of use of the Balance Sum. This additional consideration is take the form of accrued Agreed Interest and is distinct and separate from the consideration for the purchase of the Shares.

We agree with the views of the learned judge. From our reading, what is crystal clear is that cl 4.2 of the agreement allowed the appellant to request for an additional month to pay the balance sum on condition that they pay interest calculated on a daily basis. It is not disputed that the appellant did so requested for and consumed the additional month plus three days of additional time, namely, 35 days. At the end of the 35 days, the appellant breached the agreement and refused to pay the balance sum, whereupon the respondent rightly accepted the appellant's repudiation and terminated the agreement. Consequently, the respondent is entitled to forfeit the deposit pursuant to cl 13.1 of the agreement.

Before us, the appellant's counsel argued that interest is only payable if the appellant complete the transaction. We cannot fathom this argument. We would agree with the contention of the respondent's counsel that the respondent would be entitled to claim interest amounting to RM776,712.33 for the additional month plus three days even if the appellant had not breached the agreement and had completed the transaction. We would also agree with his contention that the right to calculate and demand payment of interest in consideration for granting additional time for the fulfilment of a contractual obligation is not a penalty or liquidated damages to be proved for the following reasons:

(a) the respondent's right to claim interest only arises because the appellant requested for time and was granted such time;

(b) the respondent's right to claim interest arises from accord and satisfaction and does not depend on any breach by the appellant, and is thus, neither a penalty nor liquidated damages.

In relation to this, the learned judge said:

> The accrued Agreed Interest is a separate debt due from the Defendant (appellant) to the Plaintiff (respondent) and must not be confused or 'merged' with the Balance Sum. In fact, the parties have taken particular pains to define the meaning of 'Agreed Interest' and the 'Balance Sum' distinctly and separately.

The intention of the parties were clear. It was agreed that the granting of additional time is subject to agreement to pay 'Agreed Interest'. It was also agreed that 'Agreed Interest' has to be paid even if the appellant breaches the

agreement. The words 'Deposit' and 'Final Balance' were specifically defined in the agreement and clearly does not include accrued 'Agreed Interest'.

In *The Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995, Lim Beng Choon J said:

> In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p 560:
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> > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.
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> In *Central Bank of India v Hartford Fire Insurance Co Ltd* AIR [1965] SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St Helens) Ltd* case when it says at p 1290:
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> > Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do.The court must give effect to the plain meaning of the words however much it may dislike the result.

We are satisfied that the learned judge in the instant case applied the general principles discussed above when he decided as he did. The intention of the parties must be ascertained from the words used in the agreeement. Whichever way we look at cl 4.2 of the agreement, we are of the view that the respondent would be entitled to claim interest for the additional month plus three days even if the appellant had not breached the agreement and had completed the transaction. Our sympathies are with the appellant. The RM9m which they paid as deposit have been forfeited and, in addition to that, they have been ordered to pay interest amounting to the sum of RM776,712.33 together with interest from 21 November 1997 to date of payment. But then, the court must give effect to the plain meaning of the words of cl 4.2 of the agreement however much it may dislike the result. Under the circumstances, we see no reason to disagree with the decision of the learned judge.

For the reasons stated above, we dismissed this appeal with costs. A

Appeal dismissed with costs.

Reported by Mariette Peters-Goh B

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